

NO. 43141-6-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY  DEPUTY

STATE OF WASHINGTON,

Respondent,

v.

LAURA LYNN HICKEY,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR LEWIS COUNTY

Before the Honorable Nelson Hunt, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The sentencing court violated appellant Laura Hickey's rights to trial by jury under *Blakely v. Washington*¹ in entering an exceptional sentence based upon its own factual finding regarding the "particular vulnerability" aggravating factor.

2. Appellant assigns error to Finding 1 of the Findings of Fact and Conclusions of Law for Exceptional Sentence ("Findings"), which provides:

The exceptional sentence is justified by the following aggravating circumstances:

- (a) The victim in this matter was a particularly vulnerable premature baby boy who was drug intoxicated (methamphetamine).

CP 455.

3. Appellant assigns error to Conclusion 1 of the Findings, which provides:

There are substantial and compelling reasons to impose an exceptional sentence pursuant to RCW 9.94A.535.

CP 456.

¹ *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed.2d 403 (2004)

4. Appellant assigns error to the sentencing court's oral findings that "the defendant repeatedly and habitually exposed this unborn child to methamphetamine to such an extent that, as I read the autopsy doctor's statement, he opined that the baby was already addicted to methamphetamine," and that "it does operate to support the stipulated . . . aggravating factor of particular vulnerability." 2Report of Proceedings [RP] at 18-19.²

5. Appellant assigns error to the exceptional sentence of 360 months.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. It is a violation of a defendant's constitutional rights to trial by jury when a court imposes an exceptional sentence based upon facts that are not proven to a jury beyond a reasonable doubt or stipulated to by the defendant, unless the defendant makes a knowing, voluntary and intelligent waiver of his or her rights and allows a judge to make the relevant findings. *Blakely, supra*. To prove the aggravating factor of a "particularly vulnerable victim," the prosecution had to prove 1) that the victim was particularly

²The record of proceedings consists of two volumes:
1RP—December 19, 2008, change of plea hearing; and
2RP—February 22, 2012, sentencing hearing.

vulnerable, 2) that Ms. Hickey knew that the victim was so vulnerable, and 3) that the vulnerability was a significant factor in the commission of the crime. *State v. Sulieman*.³ Here, Ms. Hickey stipulated that baby was particularly vulnerable, but did not stipulate that he was exposed to methamphetamine, that the victim was born “drug intoxicated,” that the drug exposure rendered the victim “particularly vulnerable,” that she knew of the condition, and that the resulting vulnerability was a significant factor in the commission of the crime. The appellant also did not agree to have the court consider any other evidence in deciding the sentence, nor did she waive her rights under *Blakely*.

a. Did the sentencing court violate the appellant’s *Blakely* rights by making a factual finding that the child was “drug intoxicated” from methamphetamine in order “to get around the idea that [the appellant] stipulated to a legal conclusion without a factual basis..” thereby supporting the finding that the victim in this case was “particularly vulnerable?”

b. Were the findings insufficient to support the aggravating factor where the court failed to find that the appellant knew the drug intoxication rendered the victim particularly vulnerable or that the alleged vulnerability was a significant factor in the commission of the crime?

³ 158 Wn.2d 280, 143 P.3d 795 (2006)

c. Did the court err in relying on an autopsy report submitted by the prosecution in a sentencing memorandum where there was nothing in any of the agreements permitting the court to consider the report in making its determination?

d. Where the prosecution failed to present sufficient evidence to prove the aggravating circumstance it support its request for an exceptional sentence counsel objected to that failure, is the prosecution prohibited from having a second opportunity to present sufficient evidence to meet its burden of proof on remand? (Assignments of Error 1-5).

C. STATEMENT OF THE CASE

Laura Hickey gave premature birth in her trailer in Centralia, Lewis County, Washington early on March 2, 2011. 1Report of Proceedings [RP] at 10; CP 138. She decapitated the baby using a knife. CP 14-24, 139. She was subsequently arrested and charged with murder in the first degree. CP 1-3.

As part of a plea agreement with Ms. Hickey, the State filed an amended information on February 7, 2012, charging her with one count of murder in the second degree with a deadly weapon enhancement. CP 11-13. The standard range sentence was 123-220 months, with an additional 24

months based on the deadly weapon enhancement. CP 448. The State also alleged as an aggravating factor that the victim was particularly vulnerable pursuant to RCW 9.94A.535(3)(b). CP 11.

At a hearing on February 7, 2012, Ms. Hickey entered a guilty plea to the amended information. 1RP at 5-13; CP 14. On her plea statement, she wrote:

On March 2, 2011, I gave birth to a small premature child in Lewis County. I felt the baby would not survive and I chose to cut off his head with a knife to prevent any other suffering. I'm very truly sorry for what I've done.

CP 21.

The plea statement provides that she pleads guilty to "murder 2nd with deadly weapon 1) with intent to cause death 2) caused the death of another person with aggravating factor that victim was particularly vulnerable." CP 14. A letter dated February 6, 2012 from the prosecuting attorney and attached to the Statement on Plea of Guilty states in part:

At this time, in exchange for a plea of guilty with a weapon enhancement and aggravator, the State is willing to amend the charge to Murder in the Second Degree, with a deadly weapon enhancement and particularly vulnerable victim aggravator. This would create a range of 122 to 220 months plus 24 months for the weapon enhancement.

The defendant would be able to argue for a standard range sentence. With the weapon enhancement, the standard range, in essence, is 147 to 244 months. However, the State

would be free to argue any sentence up to the statutory maximum of life.

CP 23-24.

The stipulation did not provide that Ms. Hickey agreed to have the sentencing court consider the autopsy report or other evidence in determination of the sentence. CP 14-24.

The State filed a voluminous sentencing memorandum on February 21, 2012, which contained an autopsy report prepared by Dr. Emmanuel Laesina. In the report, the doctor noted that the baby suffered from “[a]cute methamphetamine intoxication . . .” CP 134-444. The doctor’s finding was specifically quoted in the State’s sentencing memorandum. CP 142.

At sentencing on February 22, 2012, the State recommended an exceptional sentence of 984 months. 2RP at 4. The defense recommended an exceptional sentence below the standard range of 120 months, or alternatively, a sentence at the bottom of the standard range. 2RP at 11; CP 30.

The court imposed an exceptional sentence of 360 months, consisting of 336 months and a 24 month deadly weapon enhancement. 2RP at 17. In support of an exceptional sentence, the court found that the victim was particularly vulnerable and had born drug addicted to methamphetamine.

The court also found that Ms. Hickey refused to seek help for the prematurely born child. 2RP at 18.

After a recess, written findings were presented to the court. 2RP at 22. Defense counsel objected to the findings, stating the court had made additional findings that did not flow from the stipulation that the victim was particularly vulnerable. 2RP at 22. The court stated that the findings were not “aggravating factors but really it was to get around the idea that she stipulated to a legal conclusion without a factual basis.” 2RP at 23. The court redacted the finding that the mother refused to seek help for the baby and murdered him by decapitation, but retained the finding that the baby was drug intoxicated from methamphetamine. 2RP at 22; CP 455. The court stated that “the drug intoxication was part of the vulnerability, so that should stay in there.” 2RP at 23.

Timely notice of appeal was filed on February 28, 2012. CP 458. This appeal follows.

D. ARGUMENT

1. THE EXCEPTIONAL SENTENCE WAS ENTERED IN VIOLATION OF MS. HICKEY’S STATE AND FEDERAL CONSTITUTIONAL RIGHTS UNDER *BLAKELY*, THE STIPULATION WAS INSUFFICIENT TO SUPPORT THE COURT’S FINDING ON THE

**AGGRAVATING FACTOR AND REMAND FOR
RESENTENCING WITHIN THE STANDARD
RANGE IS REQUIRED.**

- a. **Ms. Hickey's *Blakely* rights were violated when the sentencing court made an additional, unstipulated factual finding that the victim was exposed to methamphetamine and was drug intoxicated.**

Under the State and Federal constitutional rights to trial by jury and due process, any facts or factors upon which a sentencing court relies in imposing an exceptional sentence above the standard range must be proven to a jury, beyond a reasonable doubt. See *Blakely v. Washington*, 542 U.S. 296, 309-311, 124 S. Ct. 2531, 159 L. Ed.2d 403 (2004). A defendant is constitutionally entitled to have every fact upon which a court relies in imposing an exceptional sentence found by a jury and proved beyond a reasonable doubt. *Blakely*, 542 U.S. at 311-14. In addition, the Washington constitutional provisions on the right to trial by jury and proof beyond a reasonable doubt are violated whenever the similar federal rights are violated. See *State v. Pillatos*, 159 Wn.2d 459, 150 P.3d 1130 (2007).

These constitutional rights may be waived, but only if the waiver is knowing, voluntary and intelligent. *Blakely*, 542 U.S. at 310; *State v. Hughes*, 154 Wn.2d 118, 133-34, 110 P.3d 192 (2005), overruled in part and

on other grounds *sub nom Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). A defendant may stipulate to aggravating facts, for example as part of a plea agreement. See RCW 9.94A.537(3); see *State v. Ermels*, 156 Wn.2d 528, 536-37, 131 P.3d 299 (2006). Such a stipulation can only support an exceptional sentence, however, if the stipulated facts are sufficient to prove the relevant aggravating circumstance. See RCW 9.94A.537(3); *State v. Hugar*, 158 Wn.2d 369, 371, 144 P.3d 298 (2006).

In the present case, state and federal constitutional mandates were violated when the sentencing court found that the child was born “drug intoxicated (methamphetamine)” in order to impose the exceptional sentence based upon “particular vulnerability.” CP 455. Because the finding of the court was insufficient to support the aggravating factor, remand for resentencing within the standard range is required.

As part of the plea agreement, the State obtained a stipulation from Ms. Hickey as to particular vulnerability for the purpose of sentencing. See CP 14, 21, 23-24. The prosecutor then relied on that stipulation, as well as the sentencing memorandum containing, *inter alia*, Dr. Lasina’s autopsy report providing information that the child was exposed to

methamphetamine, to support the argument that the aggravating factor of a “particularly vulnerable victim” justified an exceptional sentence. 2RP at 6; CP 142. However, the Statement on Plea of Guilty did not contain an agreement to allow the court to consider documents such as the autopsy report for purposes of the exceptional sentence. CP 14-24. Therefore, to the extent the court considered and relied on the autopsy report in making its finding that the victim was drug intoxicated due to methamphetamine exposure, that consideration was prohibited under *Blakely*.

b. The stipulated facts were not sufficient to satisfy the requirements of proof of “particular vulnerability.”

As noted *supra*, nothing in the change of plea statement or the prosecutor’s letter of February 6, 2012 indicated that Ms. Hickey agreed to allow the sentencing court to consider the autopsy report in deciding whether to impose an exceptional sentence. In addition, neither the plea statement nor the attached letter from the prosecutor are sufficient to support the court’s finding of the aggravating factor and the resulting exceptional sentence. A stipulation is only sufficient to support an exceptional sentence based upon an aggravating factor if the stipulation establishes all of the requirements for proof of that factor. *See Hagar*, 158 Wn.2d 369, 372-73, 144 P.3d 298

(2006). It is not sufficient that the stipulation establishes facts from which the required factor *could* be found, because making any additional finding requires the sentencing court to engage in the type of fact-finding that is explicitly prohibited by *Blakely* and its progeny. *Hagar*, 158 Wn.2d at 371-73; *State v. Suleiman*, 158 Wn.2d 280, 143 P.3d 795 (2006).

In *Hagar*, the aggravating factor was that the crimes amounted to a “major economic offense.” On review, the Court found a stipulation was insufficient and that the sentencing court engaged in improper fact-finding in violation of the defendant’s *Blakely* rights, despite the detailed stipulation of the parties as to facts from which a fact-finder could have concluded that the crimes met that definition. *Hagar*, 158 Wn.2d at 371-72. Hagar had been charged with a number of theft counts involving embezzlement, and, in entering a guilty plea, stipulated to the facts contained in the certification for probable cause, the prosecutor’s summary and the facts set forth in an appendix to the plea agreement. *Hagar*, 158 Wn.2d at 372. Those stipulations, however, were not sufficient to establish the aggravating factor, because further fact-finding was required. *Hagar*, 158 Wn.2d at 372-73. The Court found that while “Hagar stipulated [to] certain facts,” he “did not stipulate that the crimes constituted a ‘major economic offense.’” *Hagar*,

158 Wn.2d at 374. The Court found that trial court had “engaged in improper *Blakely* fact finding when it found the crimes constituted a ‘major economic offense,’” because that “unstipulated fact . . . was not found by a jury beyond a reasonable doubt.” *Id.*

In this case, the stipulated fact of particular vulnerability was insufficient to prove the aggravating factor without improper fact-finding by the court. The aggravating circumstance of a “particularly vulnerable victim” is defined in RCW 9.94A.535(3)(b) as applying when “[t]he defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance.” Whether a victim is “particularly vulnerable” is a factual determination. See *Hughes*, 154 Wn.2d at 136. To prove the “particularly vulnerable victim” aggravating circumstance, the prosecution must show 1) that the victim of the offense was either particularly vulnerable or particularly incapable of resistance. 2) that the defendant knew or should have known of the relevant vulnerability or incapability and 3) that the vulnerability or incapability was “a substantial factor” in the commission of the crime. *Suleiman*, 158 Wn.2d at 293. The mere factual stipulation does not establish all of these elements and is insufficient to support an exceptional sentence based upon this circumstance.

Suleiman, 158 Wn.2d at 293-94. In addition, a sentencing court cannot rely on a stipulation that establishes facts from which a finding of “particular vulnerability” could be made in order to make such a finding without violating the defendant’s *Blakely* rights. *Id.*

Here, the sentencing court’s finding that the victim was exposed to methamphetamine, which the judge candidly stated was to “get around the idea that she stipulated to a legal conclusion,” is made in violation of *Blakely*. 2RP at 23. The stipulation was insufficient to establish the aggravating circumstance and the sentencing court had to make an improper factual finding in order to find that the circumstance applied. Ms. Hickey stipulated that the victim was particularly vulnerable, but did not stipulate that she knew that the victim was particularly vulnerable, nor does the stipulation prove that the vulnerability was a substantial factor in the crime. The sentencing court filled in this “gap” by finding that the victim was born “drug intoxicated” from methamphetamine. 2RP at 23.

In order to satisfy the proof requirements for the “vulnerability” aggravating factor, Ms. Hickey must not only have stipulated to the underlying facts, but also must have stipulated 1) that she knew or should have known “the victim was particularly vulnerable,” 2) that the particular

vulnerability was a “substantial factor in the crime.” and 3) that the “record supported a determination of particular vulnerability.” See *Suleiman*, 158 Wn.2d at 292. Because her stipulation did not meet those requirements, the sentencing court chose to make its own factual determination in order to support its decision that the aggravating circumstance applied, in violation of *Blakely*. See also, *Suleiman*, 158 Wn.2d at 293.

Just as in *Suleiman*, the stipulated facts in this case were not sufficient to satisfy the requirements of proof for the “particular vulnerability” aggravating factor. The stipulation established only that the victim was particularly vulnerable: it did not establish that the child was drug intoxicated from methamphetamine and that that condition made the child “particularly vulnerable or incapable of resistance,” nor did it establish that Ms. Hickey knew the victim met that standard of vulnerability. In order to find the aggravating factor and impose the exceptional sentence, the judge was therefore required to fill in those blanks, making the factual finding that the victim was born “drug addicted (methamphetamine),” that the “mother refused to seek help for the child and, instead, murdered him by decapitating him,” and that the “mitigating factors presented by the defense are unpersuasive.” CP 455. Defense counsel objected to the findings on the

basis that it exceeded the stipulation. 2RP at 23. The court redacted some of the findings, and changed “drug addicted” to “drug intoxicated.” 2RP at 22, 23. The court declined, however, to take out the finding of methamphetamine intoxication. The judge then engaged in further fact-finding, finding that it was “part of the vulnerability.” 2RP at 23.

As noted *supra*, to the extent the court relied on the autopsy report as evidence to support its factual findings, that was error, because none of the relevant documents indicate Ms. Hickey’s agreement to such consideration. Moreover, the only significance that fact of methamphetamine intoxication could have is if the court used it to support its own factual conclusions that the child was particularly vulnerable, something the court was not permitted to do.

Therefore, the sentencing court violated Ms. Hickey’s rights to trial by jury by making factual findings in an improper attempt to fill in the gaps in the prosecution’s stipulation and its insufficient evidence. Reversal and remand for resentencing is therefore required.

c. Resentencing within the standard range is required.

Ms. Hickey argues that this case should be reversed and on remand, the sentencing court should be limited to imposing a standard-range sentence.

This Court should order remand for resentencing within the standard range because the prosecution failed to provide sufficient evidence to satisfy its burden of proof on the aggravating factor and should therefore be prohibited from being given a second chance to prove its case. Where the defendant presents argument about the sufficiency of the prosecution's evidence at sentencing, on remand the prosecution is limited to the evidence in the record and may not supplement that evidence in an effort to fix its failures at the first hearing. See, *State v. Ford*, 137 Wn.2d 472, 485, 973 P.2d 452 (1999); see also, *State v. Lopez*, 147 Wn.2d 515, 55 P.3d 609 (2002). Here, the prosecution failed to present sufficient evidence to support its claim that the "particularly vulnerable victim" aggravating circumstance applied. It chose to go forward without empanelling a jury, relying solely on the stipulation and the sentencing memorandum.


The autopsy report should not have been considered because the State presented no evidence of any agreement to do so. The document did not amount to findings 1) that the child was particularly vulnerable, 2) that the condition rendered the child particularly vulnerable and 3) that the vulnerability was a significant factor in the commission of the crime. Indeed, the sentencing court did not even find the latter facts, even though that was a

required part of finding that the “particularly vulnerable victim” aggravating circumstance applied. On remand, the prosecution should be limited to the record as it stands, which is insufficient to establish the missing facts necessary to prove the “particularly vulnerable victim” aggravating factor.

E. CONCLUSION

For the foregoing reasons, Ms. Hickey respectfully requests that her exceptional sentence must be vacated and the case remanded for resentencing within the standard range.

DATED: July 6, 2012.

Respectfully submitted,
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CERTIFICATE OF SERVICE

The undersigned certifies that on July 6, 2012, that this Appellant’s Opening Brief was mailed by U.S. mail, postage prepaid, to the Mr. David Ponzoha, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and copies were mailed by U.S. mail, postage prepaid, to Ms. Sara Beigh, Deputy Prosecuting Attorney, Lewis County Prosecutor’s Office, 345 W. Main Street, 2nd Floor, Chehalis, WA 98532-1900 and Ms. Laura Lynn Hickey, DOC #356119, W.C.C.W., 9601 Bujacich Rd. NW, Gig Harbor, WA 98332, true and correct copies of this Opening Brief of Appellant.

This statement is certified to be true and correct under penalty of

perjury of the laws of the State of Washington. Signed at Centralia,
Washington on July 6, 2012.

A handwritten signature in black ink, appearing to read "P. B. Tiller", written over a horizontal line.

PETER B. TILLER